THE HON'BLE SRI JUSTICE P.S.NARAYANA

W.P.No.23161 of 2007

Date : 11-12-2007

Between :

Sri Venkateswara Transport Contractors,
a registered partnership firm
Represented by its partner
D.Ramesh s/o.late Gopal Rao ..
Petitioner

And

The Singareni Collieries Company Limited,
Kothagudem, Khammam District,
Represented by its Chairman &
Managing Director
And others ..
Respondents

THE HON'BLE SRI JUSTICE P.S.NARAYANA

W.P.No.23161 of 2007

ORDER:

1. This Court ordered Notice Before Admission on 5-11-2007 and granted interim stay for a limited period.

2. This Court issued *rule nisi* on 10-12-2007. Respondents 1 and 2 filed W.V.M.P.No.3174/2007 to vacate the interim order.

3. 3rd respondent also filed counter affidavit.

4. At the request of the Counsel on record, the Writ Petition itself is being disposed of finally.

5. The Writ Petition is filed for a Writ of Mandamus declaring the action of the respondents 1 and 2 in inviting the 3rd respondent for negotiations, who is disqualified for non-filing of the Notice Inviting Tender (NIT) relating to Enquiry No.CRP/PD/05/45/ENQ.105/2007 dated 31-5-2007, as arbitrary, illegal and contrary to the procedure prescribed in Notice Inviting Tender and

consequently direct the respondents 1 and 2 to consider the offer of the petitioner whose quotation is lowest among the qualified tenderers and to pass such other suitable orders.

6. Sri Hari Sreedhar, the learned Counsel representing the writ petitioner had taken this Court through the contents of the affidavit filed in support of the Writ Petition, the respective counter affidavits and also the contents of the reply affidavit as well and would maintain that inasmuch as non-compliance of the conditions not being in serious controversy and the same being mandatory, the action is vitiated and the Writ Petition is liable to be allowed. The learned Counsel also pointed out to the relevant portions of Note 1 & 2 and would maintain if Note 1 & 2 to be carefully analysed, the writ petitioner is bound to succeed. The Counsel also would point out that even otherwise, the difference of margin of quotations between the petitioner and 3rd respondent being very slender, the writ petitioner is being deprived of the opportunity by virtue of the present impugned action.

7. Per contra, Sri Nandigama Krishna Rao, the learned Counsel representing respondents 1 and 2 had taken this Court through the counter affidavit filed by respondents 1 and 2 and would maintain that on a careful

reading of all the clauses, Note 1 & 2 cannot be said to be mandatory. Even otherwise, the authorities are having discretion and in the interest of the Singareni Collieries Company Limited, this decision had been taken and on this simple alleged violation of contravention, the writ Court not to interfere with such a decision taken by the Singareni Collieries Company Limited, in the interest of the Company as such.

8. Sri Vinod Kumar Deshpande, the learned Counsel representing the 3rd respondent had taken this Court through the contents of the counter affidavit and would maintain that in the light of the facts and circumstances, the Note on which strong reliance is being placed, cannot be said to be mandatory. Even otherwise, in the light of the respective stands taken by the parties, this Court normally to be slow in interfering with such decisions. The learned Counsel placed reliance on **Raunaq International Ltd. Vs. I.V.R. Construction Ltd. and others** [1] and **M/s. Master Marine Services Private. Ltd. Vs. Metcalfe and Hodgkinson Pvt. Ltd. and another**[2].

9. Heard the Counsel and perused the material papers placed before this Court.

10. It is averred the petitioner is a registered

partnership firm doing transport contracts. On 3-8-2007, the 2nd respondent issued notification in Deccan Chronicle English daily newspaper inviting tenders for providing A/C and non-A/C ambulances on hire basis for 1st respondent for a period of five years. It is further stated that before issuing the said notification, on 11-7-2007 the respondents 1 and 2 called for a meeting of all transport contractors to discuss about the terms and conditions of the Notice Inviting Tenders (NIT) by letter No.CRP/PD/05/45/vendormeet and after elaborate discussions finalized the terms and conditions of the Notice Inviting Tenders. The fulfillment of all the terms and conditions of NIT is mandatory for participating in the tenders and whoever violates any of the terms would be disqualified. It is further stated that as per the NIT, tenders were called for providing two A/C ambulances and twelve non-A/C ambulances. The A/C and non-A/C ambulances are treated as separate slabs. Further, as per para 2(i) of the NIT if the item wise requirement in the slab is less than or equivalent to 10, the tenderer should quote for all the vehicles and if the item wise requirement is more than 10, the tenderer should quote for a minimum of 10 or 50% of the requirement whichever is higher. The tenderer should furnish copy of Pan Card and registration of the

organization in their offer and clearly furnish its status whether partnership or Company. It is also further stated that the tenderer should submit his quotation in Format X appended to the NIT and also sign on all the papers of the terms and conditions of NIT and submit the quotation form with NIT terms and conditions by duly enclosing the required EMD as stated in the NIT. The fulfillment of the aforesaid conditions are mandatory and the tenderer who fails to comply with the said mandatory requirements would be disqualified. It is further stated that the last date of submitting tenders as 17-8-2007 and the tenders were scheduled to be opened on 18-8-2007. The petitioner submitted its quotation for supply of 10 non-A/C ambulances only. After opening of the tenders, the petitioner came to know that the petitioner is the third lowest tenderer among all. M/s. Balaji Travels was the second lowest and the 3rd respondent was the lowest tenderer among all who submitted tenders for supply of non-A/C ambulances. However, M/s. Balaji Travels is disqualified for not submitting the required amount of EMD, non-submission of PAN Card and NIT form. The 3rd respondent also was disqualified as the 3rd respondent did not submit NIT form. Thus, the petitioner was the lowest tenderer among the qualified tenderers for supply

of non-A/C ambulances. As per the terms of the NIT the 2nd respondent should have accepted the quotation of the petitioner as the petitioner's quotation was the lowest among the qualified tenderers. However, the petitioner came to know that the 2n d respondent in stead of considering the quotation of the petitioner on 19-10-2007 called the 3rd respondent for negotiations, which is contrary to the procedure contemplated in NIT. The respondents 1 and 2 who prescribed terms and conditions in NIT cannot ignore the same and call the 3rd respondent for negotiations who is otherwise disqualified. When the respondents 1 and 2 had prescribed the terms and conditions in the form of NIT which are mandatory, the respondents are not expected to give a go-bye and consider the offer of the disqualified tenderer. The action of the respondents 1 and 2 in calling the 3rd respondent for negotiations for supply of ambulances relating to Enquiry No.CRP/PD/05/45/ENQ.105/2007 dated 31-5-2007 though the 3rd respondent did not fulfill the mandatory conditions of NIT and ignoring the quotation of the petitioner whose quotation was lowest among the qualified tenderers, contrary to the terms and conditions of NIT, is arbitrary and illegal. If the respondents 1 and 2

finalise the offer of the 3rd respondent and issue work order, the petitioner shall suffer irreparable loss and great hardship. If stay of all further proceedings relating to Enquiry No.CRP/PD/05/45/ENQ.105/2007 dated 31-5-2007 including finalization of the offer of the 3rd respondent and issuance of work order is issued, no prejudice would be caused to the respondents 1 and 2 as the 1st respondent is enjoying the said services from the previous successful tenderer. In such circumstances, the writ petitioner approached this Court praying for appropriate reliefs.

11. In the counter affidavit filed by respondents 1 and 2, it is stated that there is no violation of statutory rule or regulation and hence the Writ Petition is not maintainable under Article 226 of the Constitution of India. Further it is averred that the entire grievance of the petitioner as brought out before this Court is that the 3rd respondent has to be disqualified for non-filing of the signed NIT conditions. In this regard, according to the petitioner, the 3rd respondent has to be disqualified as he had not fulfilled the mandatory requirements as brought out in the NIT. Further, according to the petitioner, the fulfillment of all the terms and conditions of NIT is mandatory and any one who violates would be

disqualified. Except the said contention, the petitioner has not brought out any other grievance before this Court. It is also further averred that the 2nd respondent advertised Enquiry dated 31-5-2007 for providing of A/C and Non-A/C ambulances on hire basis at the 1st respondent-Hospitals. The last date for receipt of quotations was 17-8-2007 and the date of opening of the tenders was 18-8-2007. Seven firms had submitted tenders and the 3rd respondent stood L-1 (Lowest Bid) and the petitioner L-2 among the qualified bidders. It is also further stated that the petitioner is not entirely right in contending that a mandatory condition of NIT had been violated by the 3rd respondent. In this regard, the 3rd respondent like the other tenderers had submitted his Bid. The defect noticed by the Tender Committee in examining the offers submitted by the firms, is that the 3rd respondent had not submitted the signed NIT terms and conditions. However, the 3rd respondent had submitted his Bid wherein it was specifically agreed to abide by all the terms and conditions mentioned in the NIT. On account of non-submission of the signed NIT conditions, the petitioner wants the disqualification of the 3rd respondent. In this regard, it is stated that as far as the 3rd respondent is

concerned, he had not submitted signed NIT conditions and the Tender Committee has to decide whether the offer of the 3rd respondent is to be taken into consideration. Further, both the petitioner and the 3rd respondent are bound by the terms and conditions which are spelt out in the NIT. The NIT consists of nearly 52 conditions with regard to submitting the applications and executing the entire contract. In none of such 52 clauses there is any mention that tenderers will invariably sign on all the pages of NIT and submit the same. Further, though there is no such mention, much less a mandatory condition, after the conditions had been laid down, a Note had been appended to the NIT which reads as follows :

> **Note:**
> 1. The tenderers shall sign on all the pages of NIT terms and conditions and submit the same along with their offer, otherwise, their offer may not be considered.

It is further stated that as can be seen from the said Note, the offer of the tenderers may not be considered if they do not submit the signed NIT terms and conditions. The said Note is not mandatory as understood by the petitioner. It is only the manner of submitting of the tenders which has to be followed by the prospective tenderers. Assuming such submission of the Bid without enclosing the signed

terms and conditions of NIT is defective, the discretion vests with the Respondents-Company whether to accept the tender as submitted by the tenderer and give him opportunity to cure the defect pointed out by the Tender Committee. It is further stated that the Company took a conscious view that the defect is not a violation of a mandatory condition as laid down in the NIT. Rather, it is a defect which does not prejudicially affect the interests of the other tenderers. It is merely to sign on all the Tender conditions which in fact the tenderers including the 3rd respondent agreed in their offer to accept all the terms and conditions of the NIT. The 3rd respondent is a new entrant to the company. Probably, he was not aware that the clause mentioned under the heading Note also has to be followed even though it does not find place in the 52 mandatory conditions as brought out in the NIT and hence giving opportunity to the 3rd respondent to sign the NIT conditions, whereafter it will come within the zone of consideration without prejudicial to the interests of the company. The petitioner is contending merely on obtaining signature and not complying with any other mandatory conditions as brought out in NIT. Even otherwise, the Writ Petition is not maintainable as there is a clause in the contract with regard to the settlement of

disputes and the same is found in clause-24 at page-6 which is as follows:

> "In all the cases of disputes, the decision of the company shall be final. The courts of Kothagudem (District Khammam) in the State of A.P. only shall have jurisdiction to deal with and decide any legal matter or dispute whatsoever arising out of this contract".

In view of the aforesaid procedure which is a mandatory condition for settlement of disputes, the present Writ Petition is not maintainable in law. Further it is stated that the grievance made out by the petitioner is that the company ought to have accepted the quotation of the petitioner as it is lowest among the qualified tenderers. Clause 29 of the terms and conditions of the NIT reads :

> "The SCCL reserves the right to reject any or all the tenders without assigning any reason".

Thus, the discretion vests with the company to reject any application and no such right vests with any contractor that his offer has to be considered and work order allotted to him. Further it is stated that the grievance made out by the petitioner that tender submitted by the 3rd respondent has to be rejected on the simple ground that he had not submitted the signed NIT papers, no other case had been made out for interference by this Court by exercising

extraordinary jurisdiction. The non-signing of the NIT Conditions are not vital as it is only a mention under the Note column and not as a mandatory condition in the various clauses incorporated in the contract.

12. In the counter affidavit filed by the 3rd respondent, almost substantially similar stand which had been taken by the respondents 1 and 2 had been repeated.

13. In the reply affidavit filed by the petitioner to the counter affidavit filed by the respondents 1 and 2, several facts averred in the affidavit filed in support of the Writ Petition already had been repeated and it was affirmed that these conditions are mandatory. The Note 1 & 2 again had been referred to in para-6 and further it is averred that Note 2 specifically records that the Sealed Quotations are to be submitted duly signed as above at point No.1 to 2nd respondent in the enclosed Format X before closing date. The said Note is part and parcel of the conditions of NIT and as such the conditions therein also are mandatory. Admittedly, the 3rd respondent did not submit the NIT terms and conditions at all along with the quotation form and as such he cannot be treated as a qualified tenderer and his tender cannot be considered for any purpose. Further, it is averred that even if it is

assumed that any discretion is there to the respondents 1 and 2 without admitting, while dealing with the disqualified quotation, the same shall be exercised fairly and not arbitrarily. The contentions of the respondents that accepting the tender of the 3rd respondent who contravened the terms of NIT do not prejudicially affect the interest of other tenderers is not true. If the tender of the 3rd respondent is disqualified, the petitioner's tender is the lowest among the qualified tenders and the action of the respondents 1 and 2 in treating the disqualified tender of the 3rd respondent as qualified and calling him for negotiations definitely affected the right of the petitioner. A statement in Form X agreeing to abide by all the terms of NIT cannot be treated as fulfillment of condition of submitting NIT terms and conditions duly signed on every page. In the present case, the 3rd respondent did not submit the NIT terms and conditions at all. The respondents 1 and 2 cannot permit any tenderer to submit any additional documents which are required to be submitted along with the tender after opening of the tender nor can they permit any tender to sign on any paper which were submitted blank after opening of the tender. The respondents 1 and 2 cannot allow the 3rd respondent to make good the defects after opening of the tenders and

no such power is conferred on them under any of the terms of NIT. It is also further averred that when the respondents 1 and 2 called for tenders for providing Jeeps on hire basis vide enquiry No.CRP/PD/05/45/3E/628/04 dated 6-1-2005 and Cars vide enquiry No.CRP/PD/05/45/E/629/04 dated 6-1-2005 M/s. Sri Sai Shakthi Travels, Kothagudem, submitted their quotations for both Jeeps and Cars. However, while submitting the tenders, the tender relating to Cars was kept in the envelop provided for jeeps and the quotation in respect of Jeeps was kept in envelop provided for Cars. Though the tender submitted by M/s. Sri Sai Shakthi Travels, Kothagudem was the lowest for cars, the same was rejected by the respondents 1 and 2 for the simple reason that the quotation was submitted in wrong envelop, though all the tenders for Jeeps and Cars were opened on the same day at the same time. As such the respondents 1 and 2 cannot contend that they have the discretion to allow the 3rd respondent to rectify the defects when submitting the tender after opening of the tenders. Certain further averments were made in paras 9, 10 and 11 of the reply affidavit.

14. These are the respective stands taken by the parties.

15. In the counter affidavit filed by the respondents 1 and 2, specific stand had been taken after referring to Note 1 & 2 that these conditions are not mandatory and it is only a Note. Further, the relevant clauses also had been referred to. Strong reliance was placed on the decision referred (2) supra wherein the Apex Court at para-13 observed :

> "The only ground on which the High Court has quashed the decision of CONCOR awarding the contract to the applicant is that there was no license to act as surveyor/loss assessor under the Insurance Act, 1938 in favour of the appellant which is a company. This question was considered by the TEC in its meeting held on 17-1-2004. The TEC also took notice of the fact that there were only two bidders (the appellant and the first respondent) in the tender and it would be desirable to prevent the tender from lapsing into a single bidder tender. After receipt of the reply from the appellant; the TEC again evaluated the tenders for pre-qualification bid and after noting that M/s. Master Marine Services Pvt. Ltd. is known to be an established surveyor doing work for a number of shipping lines at various CONCOR terminals and further that Capt. Percy Meher Master, who had the license, had been appointed the Chairman of the company, made a recommendation that both, the appellant and the first respondent may be qualified for their technical capabilities. It has to be borne in mind that para 11 of the Instructions clearly conferred a power upon the CONCOR to relax the tender conditions at any

stage, if considered necessary, for the purpose of finalizing the contract in overall interest of the CONCOR and the trade. Therefore, having regard to the fact that the Chairman of the company had a license under the Insurance Act, the condition regarding the holding of such a license by the appellant itself, in the facts and circumstances of the case, could be relaxed. So far as commercial considerations are concerned, it is the specific case of the CONCOR, which has not been disputed by the first respondent, that ninety eight per cent of the work under the contract is of data entry of a container, for which the appellant had quoted Rs.3.00 against Rs.3.75 as quoted by the first respondent and for this kind of work no license under IRDA is required. In such circumstances, no such public interest was involved which may warrant interference by the High Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution while judicial review of an administrative action relating to award of a contract. We are, therefore, clearly of the opinion that the High Court erred in setting aside the order of the CONCOR awarding the contract to the applicant".

Further, strong reliance was placed on the decision referred (1) supra, wherein at para-11, the Apex Court observed :

"When a Writ Petition is filed in the High Court challenging the award of a contract by a public authority or the State, the Court must be satisfied

that there is some element of pub interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the Court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by Court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the Court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the Court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the Court should not intervene under Article 226 in disputes between two rival tenderers".

16. In the light of the respective stands taken by the parties and also after carefully examining the clauses relating to conditions and also the Note appended, this Court is satisfied that it cannot be said to be mandatory in the facts and circumstances of the case. When discretion was exercised by the respondents 1 and 2, especially in the light of the limitations imposed on this Court in interfering with such matters in the realm of contractual field i.e., in relation to rival tenderers, this Court is not inclined to interfere with the impugned action.

17. In the light of the same, the Writ Petition being devoid of merit, the same shall stand dismissed. Parties to bear their own costs.

Justice P.S.Narayana

Date : 11-12-2007

L.R. copy to be marked : YES / NO

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[1] **AIR 1999 S.C. 393**
[2] **AIR 2005 S.C. 2299**